

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
80130-s76H BY JAMES MARTIN PEIRCE)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the July 2, 1996, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 80130-s76H by James Martin Peirce is DENIED.

NOTICE

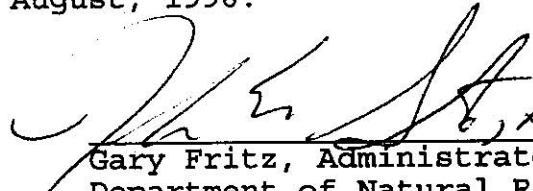
The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make

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arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 27th day of August, 1996.


Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 29th day of August, 1996 as follows:

James Martin Peirce
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Milton Freewater, OR 97862


Robert H. Scott
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Missoula, MT 59807

Ravalli County Road Dept.
244 Fairgrounds Rd
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Curt Martin, Manager,
Larry Schock, Engineering
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Vivian A. Lighthizer,
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Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION) PROPOSAL
FOR BENEFICIAL WATER USE PERMIT) FOR
80130-S76H BY JAMES MARTIN PEIRCE) DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on May 7, 1996, in Missoula, Montana, to determine whether a Beneficial Water Use Permit should be granted to Applicant for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1995).

APPEARANCES

Applicant James Martin Peirce appeared at the hearing by and through counsel, David L. Pengelly.

Objectors Thomas D. and Wendy S. O'Bryan appeared at the hearing by and through Thomas D. O'Bryan and counsel, Robert H. Scott. Lee Yelin, Water Rights, Inc., appeared at the hearing as a witness for Objectors O'Bryan.

EXHIBITS

Applicant offered no exhibits for the record.

Objector O'Bryan offered eight exhibits for the record.¹

All were accepted without objection.

¹O'Bryans' exhibits were introduced in tandem (as applicants and objectors) since the cases were consolidated. Some of the exhibits are not relevant to this application.

O'Bryans' Exhibit 1 is an aerial photograph measuring 20 1/4 inches by 26 1/4 inches taken in 1975 of O'Bryans' property, the north end of the Pierce property, and the west side of the Buker property.

O'Bryans' Exhibit 2 is a clear overlay which depicts O'Bryans' intent when their application for permit was filed.

O'Bryans' Exhibit 3 (1 through 11) consists of six pages, each of which has two photographs affixed to it except the last page which has one photograph affixed to it. Each photograph has an explanation below the picture.

O'Bryans' Exhibit 4 is a table of the dates flow measurements were taken, location of each measurement, the method of each measurement, and the flow rate measured. Those that pertain to Application 77814 by O'Bryan and 80130 by Applicant are checked in black ink.

O'Bryans' Exhibit 5 is a topographic map of O'Bryans' proposed project prepared by Water Rights, Inc.

O'Bryans' Exhibit 6 consists of four pages. The first page is a letter dated December 23, 1993, explaining the amendments made to Application No. 80959-s76H in an attempt to settle the objections. The second and third pages contain a stipulation to resolve objections and states the amendments made to that application. The fourth page sets forth conditions to be placed on the permit issued for that application in exchange for objection withdrawal.

O'Bryans' Exhibit 7 is a detailed layout of the pond berm,

the standpipe outlet, and inlet box.

O'Bryans' Exhibit 8 is a plan paper measuring 23.75 inches by 36 inches upon which the site plan, the pond liner detail, and the screened outlet detail are shown.

PRELIMINARY MATTERS

David L. Pengelly, Counsel for Applicant, appeared at the hearing and made the following statement:

First, with respect to Mr. Peirce's application 80130, it is my understanding that all objections except the objection of the O'Bryans' have been withdrawn. I would like to point the court's attention to the withdrawal by the Ravalli Road Department and a copy of the response that was filed by me on behalf of my client on March 12, 1993, and it should be in the record. In effect clarifying the application with respect to that application. I don't want to belabor the point, but I would just ask that the Hearing Examiner look at that in the course of coming to a decision in this case. Additionally, my client does not, cannot be here today. We were under the impression that as of as late as on Friday that we probably had some agreement reached with Mr. O'Bryan. My client was in town briefly on business but he drives a school bus for one of the local schools and he had to go back to Victor and is not here. My client is prepared to stand on the application as submitted with the modifications that are contained in that objection withdrawal and does not intend to produce any further evidence in support of the application. My client will be filing a late claim on this water also. If the Department wishes to enter an order on this application either way it's really not going to make much difference in the long run to my client. The water has been used on my client's property for a long period of time and the application was originally filed before late claims were allowed. They have since then been authorized by the state legislature and so we will intend to pursue that.

After a few more comments concerning the O'Bryan application, Mr. Pengelly added:

Mr. Peirce's application, I think was accurate as to his proposed diversion points being essentially

below what the O'Bryans were intending to do based on his understanding of the original O'Bryan application as set forth on the map because it showed ditches wholly within O'Bryans' fence line and he has no objection to that. I think the problem we're dealing with, as I understand the current O'Bryan application, they intend to now run a ditch outside their fence line to intercept water [flows] in a borrow pit that Mr. Peirce had historically used as part of his water right. He would not have made those comments to his application if he had understood the O'Bryan application to be going outside the fence line. As far as the material change in his [Mr. Peirce's] proposed diversion point, what he has done - his original application indicated that he would collect water all along the southerly boundary of the O'Bryan property in a borrow pit. What he has done to solve the objection with the Ravalli County Road Department was agreed to have an initial pick up point right at the head of that stretch of property, collect what water was available at that point, put it in a culvert, run it underneath the road, put it on his property on the south side of the road and not collect any water in the remainder of the borrow pit.² So I think it was simply a reduction in the original diversion. But as I've said as a practical matter, Mr. Peirce's solution to this is going to be a late claim.

After another comment concerning the O'Bryan application, Mr. Pengelly exited the hearing.

Mr. Scott then made the following statement:

... Absolutely no evidence was presented at this hearing, just some argument by Mr. Pengelly so the sole evidence in the record is what is in the Department file. Having had no opportunity to examine or cross-examine any of the people that placed that evidence in the record such as it is, I would move that the Department disregard the substance of the Department file because I haven't had a chance to examine the authors thereof and therefore I think that any action would be denial of due process to us as the objectors therein.

The Hearing Examiner reserved a ruling on the motion until the Proposal for Decision. Most of the information provided to

²See O'Bryans' Exhibit 1.

show the criteria for issuance of a permit originated with O'Bryans' consultant and Mr. Scott did, during the hearing, examine Mr. Yelin at length concerning that information. The information concerning the objection and ultimate stipulation by the Ravalli County Road Department and Applicant was produced by Applicant and Mr. W.L. Higginbotham, Road Supervisor. Neither the Applicant nor Mr. Higginbotham appeared at the hearing and, of course, were not available for cross-examination. Since that stipulation was the reason Applicant moved the proposed point of diversion upstream of the O'Bryans' proposed point of diversion, Mr. Scott should have been able to cross-examine both the Applicant and Mr. Higginbotham. However, the decision in this matter renders that point moot.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 80130-s76H in the name of and signed by James Martin Peirce was filed with the Department on December 19, 1991. (Department file.)

2. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source, on July 8, 1992. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. Three objections

to this application were received by the Department. Applicant was notified of these objections by a letter from the Department dated August 3, 1992. (Department file.)

3. Applicant proposes to divert 1.5 cubic feet per second up to 365.10 acre-feet of water from an unnamed tributary of the Bitterroot River (waste water) at points between the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, Township 8 North, Range 20 East, Ravalli County, for irrigation of 120 acres and stock water. The stipulation placed the point of diversion "at a location jointly determined" between Applicant and the Ravalli County Road Department. It appears this point of diversion would be in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18. The proposed places of use for irrigation are: 40.00 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18 and 80.00 acres in the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 19. The proposed places of use for the stock are the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18 and the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 19. The proposed period of diversion for the irrigation is from April 1 to October 31, inclusive of each year and for the stock from January 1 to December 31 inclusive of each year. The proposed means of diversion is a headgate with ditch.

(Department file and testimony of Lee Yelin.)

4. Applicant has not proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed, in the amount Applicant seeks to appropriate or that the amount requested is reasonably available during the period in which Applicant seeks to appropriate. Measurements of

the water flowing in the borrow pit were conducted by Lee Yelin on June 10, 1992, June 13, 1992, July 4, 1992, July 28, 1992, October 18, 1992, and November 17, 1992. The borrow pit was frozen when the November measurement was taken. On June 10, 1992, 1.03 cubic feet per second of water was flowing in the borrow pit. On June 13, 1992, there was 0.70 cubic feet per second of water flowing in the borrow pit. There was 0.90 cubic feet of water flowing in the borrow pit on July 4, 1992. There was 0.89 cubic feet per second of water flowing in the borrow pit on July 28, 1992. On October 18, 1992, there was 1.33 cubic feet of water flowing in the borrow pit. None of these measurements show availability of 1.5 cubic feet per second. (Testimony of Lee Yelin and O'Bryans' Exhibit 4.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicant has failed to prove by a preponderance of evidence, the criteria for issuance of a permit have been met. See Findings of Fact 3 and 4.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER


Application for Beneficial Water Use Permit 80130-s76H by James Martin Peirce is DENIED.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 2nd day of July, 1996.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6615

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this

8th
day of July, 1996, as follows:

James Martin Peirce
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